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BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER  
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WILLIAM A. MUNDELL  
Commissioner  
JEFF HATCH-MILLER  
Commissioner  
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Commissioner  
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Commissioner

Arizona Corporation Commission

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IN THE MATTER OF DISSEMINATION OF  
INDIVIDUAL CUSTOMER PROPRIETARY  
NETWORK INFORMATION BY  
TELECOMMUNICATIONS CARRIERS

DOCKET NO. RT-00000J-02-0066

COMMENTS OF ARIZONA WIRELESS CARRIERS GROUP

The Arizona Wireless Carriers Group<sup>1</sup> (collectively, "Wireless Carriers") submits these comments on the proposed Customer Proprietary Network Information ("CPNI") rules ("Proposed Rules")<sup>2</sup> circulated by the Commission's Staff. The Wireless Carriers urge the Commission Staff not to proceed with drafting Arizona-specific CPNI rules given the comprehensive Federal Communications Commission rules adopted in July 2002 to protect customer information.<sup>3</sup> If the Staff recommends CPNI rules, however, they should at a minimum be consistent with the FCC's requirements.

<sup>1</sup> For purposes of this proceeding, the Arizona Wireless Carriers Group consists of AT&T Wireless PCS, LLC, Cricket Communications, Inc., Nextel West Corp. d/b/a Nextel Communications, Sprint, Verizon Wireless, ALLTEL Communications and VoiceStream PCS III Corporation d/b/a/ T-Mobile.

<sup>2</sup> For ease of citation, we simply refer to the provisions by their section number (e.g., Section R14-2-xx01 is referred to as "Section 1" of the Proposed Rules.)

<sup>3</sup> 47 C.F.R. §§ 64.2001 *et seq.* ("FCC Rules").

1 Each of the Wireless Carriers has implemented CPNI notice and consent procedures  
2 consistent with rules adopted by the FCC. There is no record of dissatisfaction or complaint in  
3 Arizona or elsewhere with this approach that would justify adding any new state-specific  
4 requirements. Given the competition in the wireless industry, wireless carriers have always  
5 recognized that customers dissatisfied with a service can and will go elsewhere. The Wireless  
6 Carriers are therefore all committed to customer satisfaction and recognize privacy concerns are  
7 an important part of that commitment. As a result, the Wireless Carriers have agreed to comply  
8 with the terms of the Cellular Telecommunications and Internet Association's Consumer Code,  
9 which requires a strict adherence to privacy laws. The Wireless Carriers also each have privacy  
10 policies and fully disclose their information practices, which include customer choice in regard  
11 to how information is used and disclosed.

12 In addition, Staff must make a record of the specific harms or concerns that it believes  
13 will be avoided by the additions to the FCC rules before it can act; and it has not done so here. A  
14 comprehensive factual record supporting the need for each rule is particularly essential given the  
15 First Amendment concerns inherent in these proposals. These factors all strongly argue against  
16 another layer of local privacy regulation. Given the lack of evidence of need for new Arizona  
17 CPNI rules, and the presence of effective federal and self-regulation mechanisms, the Wireless  
18 Carriers urge the Staff not to recommend CPNI rules.<sup>4</sup>

19 Although the Wireless Carriers do not support any rulemaking on this issue at the State  
20 level, we nonetheless identify below those Proposed Rules that we think are duplicative,  
21 confusing, or add little to the protections afforded customers yet which add significant burden to  
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24 <sup>4</sup> We reserve the right to question whether these rules are properly directed to wireless carriers and whether  
the necessary rulemaking authority has been delegated to the Commission.

1 carriers. We urge the Staff to continue the dialogue it has started and to accept these comments  
2 in the spirit of cooperation.

### 3 THE EXISTING PRIVACY FRAMEWORK

4 The existing privacy framework is comprehensive and the result of over a decade of  
5 learning, comment, and study at the national level. Simply put, the FCC's rules protect a  
6 customer's CPNI, which is the information about the customer's usage and services, from  
7 disclosure to third parties for marketing purposes without notice and consent. The form of notice  
8 and type of consent vary.

9 In its CPNI docket, the FCC established that customers expect to hear from carriers about  
10 new plans and services within the bundle of services subscribed to by their customers. The FCC  
11 found that notice and consent was unnecessary in this case because customers expected and  
12 wanted to hear about such new services, and it was not in the public interest to constrain the free-  
13 flow of such information. Permitting the use of CPNI for this purpose is known as the "Total  
14 Service Approach" and is allowed without customer approval under 47 C.F.R. § 64.2005.

15 The FCC next determined that a wireless carrier could share CPNI with its partners to  
16 inform customers about communications-related services or products after notice to the customer  
17 and an opportunity to opt out of such communications. The disclosure is subject to strong  
18 contractual safeguards that require confidentiality of the information. Finally, the FCC  
19 determined that CPNI could not be shared with unrelated third parties for marketing purposes  
20 without a customer's opt in approval after notice.

21 For information that is not CPNI, such as a customer's name, address and phone number,  
22 a wireless carrier's use of that information is subject to its privacy policies and its customer  
23 agreements. A carrier that misuses such information in contravention of its published privacy  
24

1 policies would be subject to enforcement action by the FCC or civil suit for a violation of a  
2 state's consumer protection laws or breach of contract. Thus, there is a strong incentive in the  
3 law to protect such information and to act consistently with the terms of a published policy.

4 This privacy framework is transparent to the customer, and is in place and working  
5 properly. Indeed, the FCC publishes quarterly summaries of complaints received,<sup>5</sup> and misuse of  
6 CPNI or general privacy complaints are not among the complaints raised by consumers. Given  
7 that customers have not expressed concerns, at most an education campaign about the safeguards  
8 that exist in the law to protect CPNI would be a better alternative than additional, local rules.

#### 9 **APPLICATION OF THE PROPOSED RULES - TOTAL SERVICE APPROACH**

10 Section 1 of the Proposed Rules states that the rules are "in addition to" the FCC's Rules  
11 and that, "together with" the FCC Rules, they govern the release of CPNI in Arizona.<sup>6</sup> Yet the  
12 Proposed Rules do not track section-by-section with the FCC Rules. Thus, it is unclear whether  
13 the FCC Rules form the regulatory floor and the Proposed Rules simply add to the requirement  
14 in certain specific areas. The Wireless Carriers understand the Proposed Rules to be additive to  
15 the FCC Rules and that to the extent an FCC Rule is not specifically cited or incorporated by  
16 reference, it nonetheless applies.

17 For example, Section 64.2005 of the FCC's Rules codifies the FCC's Total Service  
18 Approach, which permits telecommunications carriers to use, disclose, or permit access to CPNI  
19 for the purpose of providing or marketing service offerings among the categories of service to  
20 which the customer already subscribes from the same carrier, without customer notice or  
21 approval. For wireless service providers, this means that they may use, disclose, or permit  
22 access to CPNI derived from the provision of commercial mobile radio services ("CMRS"),

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<sup>5</sup> See <http://www.fcc.gov/cgb/>

24 <sup>6</sup> See R14-2-xx01.

1 without notice or customer approval, for the provision of customer premises equipment and  
2 information service(s).<sup>7</sup> The Proposed Rules do not expressly address the Total Service  
3 Approach, nor do they specifically incorporate Section 64.2005. Nonetheless, the Wireless  
4 Carriers understand that the FCC Rule governs a wireless carrier's marketing communications  
5 with its customers notwithstanding any implication to the contrary in the Proposed Rules, and  
6 ask the Staff to confirm that understanding.

7       If this were not the case, the Proposed Rules would appear to create two categories of  
8 approval for CPNI use -- opt-out for sharing CPNI with affiliates and other related parties  
9 offering communications-related services<sup>8</sup> and opt-in for sharing CPNI with unrelated third  
10 parties on other than communications-related services<sup>9</sup> -- when the FCC created three categories.

11 The Staff should confirm the Wireless Carriers' understanding that the Proposed Rules do not  
12 contradict § 64.2005 (Total Service Approach) which codifies a third lawful use of CPNI by  
13 carriers. We recommend adding a new section after the Definitions Section in the Proposed  
14 Rules as follows:

15       **R14-2-xx\_\_ Service Related Use of Customer Proprietary Network Information.**  
16       The Commission adopts, incorporates, and approves as its own 47 C.F.R. § 64.2005,  
17       revised as of September 20, 2002, incorporated by reference, on file with the Office of  
18       the Secretary of State, and copies available from the Commission Office and the United  
19       States Government Printing Office.

20       The Total Service Approach was the cornerstone of the FCC's CPNI decision balancing  
21       privacy interests and consumers' access to information about products and services. The record  
22       before the FCC amply demonstrated the benefits to consumers of the approach:

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23       <sup>7</sup> Wireless Carriers may likewise market services formerly known as adjunct-to-basic services, such as, but  
24       not limited to, speed dialing, computer-provided directory assistance, call monitoring, call tracing, call blocking, call  
25       return, repeat dialing, call tracking, call waiting, caller I.D., call forwarding, and certain centrex features under the  
26       same terms.

27       <sup>8</sup> See R14-2-xx03.

28       <sup>9</sup> See R14-2-xx04.

1  
2 Although the record evidence demonstrates that a substantial portion of consumers have a  
3 high level of concern about protecting the privacy of their CPNI (a concern most acute  
4 for disclosure to parties other than their own carrier), the record also makes evident that a  
5 majority of customers nevertheless want to be advised of the services that their  
6 telecommunications providers offer. Furthermore, the record establishes that customers  
7 are in a position to reap significant benefits in the form of more personalized service  
8 offerings (and possible cost savings) from their carriers and carriers' affiliates providing  
9 communications-related services based on the CPNI that the carriers collect. Enabling  
10 carriers to communicate with customers in this way is conducive to the free flow of  
11 information, which can result in more efficient and better-tailored marketing and has the  
12 potential to reduce junk mail and other forms of unwanted advertising. Thus, consumers  
13 may profit from having more and better information provided to them, or by being  
14 introduced to products or services that interest them. The empirical evidence indicating  
15 that a majority of customers want to be advised of service offerings from their carriers is  
16 consistent with the expectation that targeted carrier marketing will benefit them.<sup>10</sup>

17  
18 Nothing in the record of these proceedings refutes the FCC's findings. In the year since  
19 implementation of the FCC Rules, our experience is that customers appreciate being informed of  
20 new offerings, new devices, and new products and services. There is no record of abuse,  
21 customer concern, or complaint from the Total Service Approach. There is thus no basis for  
22 adopting a different approach in the Proposed Rules.

23  
24 More fundamentally, the direct restriction of a carrier's First Amendment right to  
communicate with its own customer led to the invalidation of the initial FCC Rules by the Tenth  
Circuit Court of Appeals.<sup>11</sup> Following the Tenth Circuit's guidance, the FCC interpreted Section  
222 of the Communications Act to permit a carrier to communicate with its customers and to use  
CPNI without prior notice or approval for its own marketing purposes.<sup>12</sup> The FCC has stated  
that it would view the requirement for a *written* approval as even more restrictive than an opt-in

<sup>10</sup> Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer  
Proprietary Network Information and Other Consumer Information, Third Report and Order and Third Further  
Notice of Proposed Rulemaking, 17 FCC Rcd 14860 (2002) ("CPNI Order"), ¶ 35, (footnotes deleted).

<sup>11</sup> *U.S. West v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

<sup>12</sup> *CPNI Order* ¶¶ 69-72.

1 requirement.<sup>13</sup> Thus, it is incumbent upon the Staff to ensure that this constitutional question  
2 does not arise in these proceedings.<sup>14</sup>

3 The U.S. District Court for the Western District of Washington recently echoed the Tenth  
4 Circuit ruling when it enjoined the Washington Utilities and Transportation Commission  
5 ("WUTC") from implementing restrictive opt-in rules.<sup>15</sup> The Court noted the similarities  
6 between the WUTC's proposed rules and the opt-in CPNI rules struck down by the Tenth  
7 Circuit.<sup>16</sup> The Court concluded that the WUTC's rules raised "serious constitutional issues" that  
8 warranted a close inspection of the record supporting the WUTC's rules, and preliminarily  
9 enjoined enforcement of the rules.

#### 10 VERIFICATION OF OPT OUT

11 Section 8 of the Proposed Rules requires carriers to verify *in writing* a customer's opt-out  
12 consent within 180 days, apparently from the date of notice.<sup>17</sup> The confirmed "verification" is  
13 nothing more than confirmed opt-in with a slight delay. By the Staff's own definition in Section  
14 2(8) of the Proposed Rules, opt in approval means the customer's affirmative, express consent.

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17 <sup>13</sup> CPNI Order, ¶70 ("the only more restrictive approach that could be adopted [than opt-in], as noted  
18 above, would be express written approval.").

19 <sup>14</sup> To the extent that any other statute or rule currently in existence conflicts with the Total Service  
20 Approach, such a rule would be preempted. For example, Arizona Revised Statute 40-202.C could be interpreted to  
21 provide that customer and account information is confidential unless specifically waived by the customer in writing.  
22 Thus, we would expect the Staff to view such restrictions as likely void on preemption grounds. In any event, there  
23 is nothing inconsistent between maintaining confidentiality under the State rule and the Total Service Approach  
24 inasmuch as carriers do not disclose CPNI to third parties for third party marketing purposes under the FCC Rules.  
Rather, wireless carriers can access, use and disclose CPNI to communicate regarding total service with their own  
customers.

<sup>15</sup> See Order Granting Preliminary Injunction, *Verizon Northwest, Inc. v. Showalter*, No. C02-2342R (W.D.  
Wash., filed February 10, 2003).

<sup>16</sup> *Id.* at 7, n.4 (noting especially the requirement for "opt-in approval for the use of some CPNI for 'out-of-  
category' marketing").

<sup>17</sup> The period of time is ambiguous in the Proposed Rules. The 180 days could be measured from the date  
on which the carrier is first authorized to access the CPNI under the Proposed Rules (*i.e.*, 30 days from the date of  
Notice).

1 What else besides an opt-in is the written or electronically signed "verification" of a customer's  
2 prior approval to use or disclose CPNI? Such an approach runs afoul of the First Amendment.

3 In the seminal *US West* case noted above, the Tenth Circuit applied the U.S. Supreme  
4 Court's four-part *Central Hudson* test to determine whether the FCC's opt-in requirement was  
5 constitutional.<sup>18</sup> The third and fourth prongs are applicable to the Staff approach here. The  
6 government must show that the restriction on commercial speech directly and materially  
7 advances a substantial state interest and that the regulation is narrowly drawn.<sup>19</sup>

8 The Tenth Circuit concluded that the FCC did not demonstrate that its opt-in regulations  
9 directly and materially advanced its enumerated interests, particularly given the absence of a  
10 record of harm.<sup>20</sup> The court concluded that the opt-in requirement was not "narrowly tailored"  
11 because the agency had not demonstrated a sufficiently good fit between the means chosen (opt-  
12 in or express approval) and the desired statutory objectives (protecting privacy and competition),  
13 finding that the FCC had failed to adequately consider an "obvious and less restrictive  
14 alternative," an opt-out strategy.<sup>21</sup>

15 The Wireless Carriers do not argue that the Staff must find the absolute least restrictive  
16 approach here. That would be contrary to the Tenth Circuit opinion as well.<sup>22</sup> But we do say  
17 that the Staff must propose a rule with a sufficiently good fit between the means (verification)  
18 and the desired end (protection of consumer privacy). And there must be a record of compelling  
19 evidence that anything beyond the "opt out" approved by the FCC as constitutionally least  
20 restrictive is required by something unique to Arizona. In sum, under the fourth prong, the

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22 <sup>18</sup> *US WEST v. FCC*, 182 F.3d at 1233. See also *Central Hudson Gas & Elec. Corp. v. Public Service*  
*Comm'n of N.Y.*, 447 U.S. 557(1980) (*Central Hudson*).

<sup>19</sup> *Central Hudson*, 447 U.S. at 564-65. See also *US WEST*, 182 F.3d at 1233.

<sup>20</sup> *US WEST*, 182 F.3d at 1235.

<sup>21</sup> *US WEST*, 182 F.3d at 1238.

24 <sup>22</sup> *Id.* at 1238, n.11 (The fourth prong of *Central Hudson* "does not amount to a least restrictive means  
test.").

1 Commission will have to demonstrate that the regulations are "no more extensive than necessary  
2 to serve the stated interests."<sup>23</sup>

3 In the *Verizon* CPNI challenge noted above, the court made it clear that the fourth prong  
4 of *Central Hudson* imposed a serious obligation on utility commissions to consider alternatives  
5 to opt-in and the more restrictive written approval:

6 This court finds that there are other means available to achieve the same purpose that  
7 impact less speech. For instance the state could more stringently regulate the form and  
8 content of opt-out notices and combine those regulations with educational campaigns to  
9 inform consumers of their rights.<sup>24</sup>

10 The Staff's current proposal, which appears to create an opt-in requirement where the  
11 FCC permits opt-out, would not withstand challenge. It is not only unlawful but unnecessary. In  
12 our experience, customers do not want or need such frequent notices and reminders of their  
13 rights to limit CPNI use. Such frequency of communication in our view only annoys customers  
14 and reduces the likelihood that the consumer will read and respond to the notices and increases  
15 their annoyance. An adequately written notice that provides a customer with an effective means  
16 to exercise choice need not be renewed monthly, quarterly, or even yearly to be effective.

17 As designed, with the frequency of notices and the requirements for written verification,  
18 reminders and annual refresher notices, the burden is excessive and without precedent. To be  
19 narrowly tailored, the government's speech restriction must signify that the agency made a  
20 careful calculation of the costs and benefits associated with the burden on speech imposed by its  
21 prohibition.<sup>25</sup> The Proposed Rules signify the opposite.

22 Constitutional issues aside, the Wireless Carriers also have concerns about the substance  
23 of the proposed opt-out verification provisions. For example, Section 8.B.1-5 of the Proposed

24 <sup>23</sup> *U.S. West*, 182 F.3d at 1238 (quoting *Coors Brewing*, 514 U.S. at 486, 115 S.Ct. 1585).

<sup>24</sup> *Verizon*, *supra* n. 15 at 1195.

<sup>25</sup> *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993).

1 Rule places the burden on the carrier to create a system of verification acceptance that proves the  
2 identity of the customer verifying the approval and his authority to do so. Section 8.E of the  
3 Proposed Rules states that if the verification is obtained orally, it must be recorded and  
4 presumably retained as a record for a sufficient period of time to defend claims similar to  
5 slamming or cramming for CPNI disclosure even though the FCC Rules only require retention of  
6 approvals for one year.

7 Does the oral verification contemplate or permit outbound calls to customers? If so, how  
8 does this method square with Do Not Call rules? Isn't the call to obtain the verification an  
9 unnecessary intrusion into the customer's peace and quiet enjoyment? Again, the absence of any  
10 record and any effort to narrowly tailor the Proposed Rules undercuts any claim that the  
11 Proposed Rules substantially advance the government's goals.

12 The Section 8.G requirement for carriers to "direct" third parties to stop using CPNI if  
13 verification is not received is bound to lead to customer confusion. When does the direction take  
14 effect? Immediately? What if the affiliate has a marketing campaign underway -- must it cease  
15 immediately? What if the CPNI is used to support a year's worth of direct mailing? Must the  
16 fruits of the CPNI be suppressed as well? What is the carrier's liability for a failure of the related  
17 party to honor the request? Must the carrier take affirmative action to prevent further use up to  
18 and including injunctive relief? These issues are all caused by an ill-conceived "verification"  
19 procedure to ensure that the customer really approved the use of CPNI in the first place.<sup>26</sup>

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23 <sup>26</sup> For substantially similar reasons, and due to the excessive burden on carriers, the Wireless Carriers urge  
24 the Staff to eliminate the confirmation requirement in Section 9 of the Proposed Rules. We also note that the  
safeguards required by the FCC Rules whenever CPNI is shared with third parties more than adequately covers the  
obligations of carriers and third parties whenever a customer changes his or her election. See Section 64.2007(b)(2)  
(requiring confidentiality agreement to protect CPNI).

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1           4) Required Website Notice. The FCC's rules do not require, but merely permit, a web  
2 site posting of CPNI information. Many carriers choose to provide information of interest to  
3 customers on a web site, but this has never been required. Second, we question whether the  
4 inclusion of state CPNI notices on a company web site is more likely to illuminate than to  
5 confuse a customer. Web sites that contain numerous policies, terms of use, and other  
6 disclaimers or communications may raise more questions for Arizona consumers. Accordingly,  
7 we urge the Staff to eliminate this requirement.

8           5) Telemarketing. The Wireless Carriers who do not sell, lease, or transfer customer list  
9 information ("CLI") should not be required to suggest that unlisted or nonpublished numbers  
10 may still be provided to telemarketers. CLI is NOT regulated under the CPNI rules, and we see  
11 no basis for the Commission to pass rules under the CPNI authority to restrict carrier use of CLI.  
12 Moreover, carriers typically address CLI disclosure in published privacy policies. Apart from a  
13 carrier's right to use CLI, linking CLI to telemarketing restrictions and explanations in the CPNI  
14 notice is ill conceived and will raise more questions than it will answer about customer rights in  
15 regard to rejecting or responding to third party telemarketing calls. Wireless carriers should not  
16 bear the cost of responding to such inquiries.

17           6) Right to Limit Use. It is consistent with the FCC's rules to inform customers of their  
18 CPNI rights but the Proposed Rule suggests that customers have "a right to direct the company  
19 not to use CPNI." The FCC has rejected this notion, and it is contrary to the Total Service  
20 Approach. To avoid confusion, the Staff should again follow the FCC Rule language and  
21 eliminate this requirement.

22           7) Duty of Carrier. We make the same comment as in number (6).  
23  
24

8) CPNI Definition. This requirement is completely duplicative of the FCC Rule and the Proposed Rule in (1) above and should be eliminated.

9) Right to Service. A customer has a right to withhold approval for the use and disclosure of CPNI to third parties, and consistent with the FCC Rule, that is appropriate to include in the Notice. But again, as it is consistent with the FCC Rules, we see no reason to require it here.

10) Revocation of Consent. Again, the FCC Rules are very clear on the need to inform a customer of their rights to grant, withhold, or withdraw approval and to provide "precise" steps for accomplishing it. We see this requirement as a less clear rephrasing of the FCC Rule and recommend it be deleted.

11) Multilingual Notice. The Wireless Carriers oppose the obligation to print notices in both English and Spanish.

While much of the Staff's Proposed Rules for notices track the FCC's rules, the Wireless Carriers have cited some significant departures above. The preference of wireless carriers is to have a nation-wide notice without state-specific additions. Thus, we would eliminate any additional notice requirements beyond those required in the FCC rules.

## CONCLUSION

The Proposed Rules would better serve both customer and carrier and would avoid constitutional entanglements if they adopted the FCC's rules whole cloth. We appreciate the Staff's solicitation of our views. We will continue to work with the Staff to address concerns regarding the Proposed Rules, but urge staff to find that the FCC's rules provide a more than adequate baseline of protection for all customers.

1 DATED this 30<sup>th</sup> day of August, 2004.

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